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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 181.

WILLIAM L. CHESBROUGH AND MILDRED J. CHESBROUGH,
Petitioners,

vs.

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY AND W. LEE SHIELD, SUPERINTENDENT OF INSURANCE OF THE STATE OF OHIO,
Respondents.

BRIEF ON BEHALF OF RESPONDENT THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY.

OPINIONS OF THE COURTS BELOW.

The opinion of the trial court, the Court of Common Pleas of Franklin county, Ohio, is not reported but is printed as Appendix B hereto.

The opinion of the Court of Appeals of Franklin county, Ohio, is reported in 51 O. L. Abstract at page 320 and is printed as Appendix A hereto.

The entry of the Ohio Supreme Court dismissing the appeal is reported in 149 O. S., 578. Its entry overruling the motion to certify is not reported. Both entries are printed at page 36 of the transcript of record herein.

JURISDICTION.

Jurisdiction is invoked under Section 237 of the Judicial Code as amended by the act of February 13, 1925, 43 Statutes, 937, (U. S. C., Title 28, Sect. 344), presumably on the ground that the action of the Supreme Court of Ohio drew in question the validity of Sections 9364-1 and 9364-8 of the General Code of Ohio on the ground of their being repugnant to the United States Constitution. We suggest that no such jurisdictional ground exists in this case.

Petitioners hold several non-participating policies issued by respondent, an Ohio stock life insurance corporation, at a time when the Ohio statutes (O. G. C. Section 9364-1 et seq., Appendix C) provided for the conversion of Ohio insurance companies from stock to mutual companies. These statutes prescribe the steps which must be taken in the course of such conversion, one of them being a vote of policyholders holding policies of $1,000 or more which have been in force for at least one year. Petitioners sought to invoke the jurisdiction of the state courts under the Ohio Uniform Declaratory Judgments Act (Appendix D) which requires that the legal relations of the parties seeking a declaration thereunder must be "affected" by the statute which is to be considered. Petitioners prayed for a judgment declaring unconstitutional the statute which prescribed the aforesaid restricted vote. The cause was submitted on the fourth amended petition and the answer without evidence.

The trial court found that the alleged facts were not sufficient to entitle petitioners to invoke the jurisdiction of the court to determine the constitutionality of the statute since the petitioners did not claim that they had been or would be injured by mutualization, had no vested rights in the capital or surplus of a stock life insurance company

and could not invoke the Ohio Uniform Declaratory Judgments Act in challenging the constitutionality of the statute unless they had an actual controversy and were in danger of sustaining some direct injury. (Appendix B.)

The conclusions of the trial court are well summarized by the appellate court's per curiam opinion in the following language:

> "The trial court, in a lengthy and well-considered opinion, after setting forth the facts admitted by the pleadings, found that these facts were not sufficient to entitle the plaintiffs to invoke the jurisdiction of the Common Pleas Court to determine the constitutionality of these statutes. However, in view of the importance of the questions raised, it deemed it proper to consider the claims of the plaintiffs as to the unconstitutionality of the aforesaid sections, and after doing so it declared them to be constitutional. The assignments of error are all directed to these rulings by the trial court." (Appendix A.)

The Supreme Court of Ohio declined to review. It overruled a motion to certify and dismissed the appeal. The petitioners now pray for a writ of certiorari to reverse "said judgment of the Supreme Court of Ohio, entered by it on April 29, 1948, wherein it refused a motion to certify the record to the court for review and dismissed the petition".

We submit that this court has no jurisdiction to review the Ohio Supreme Court's denial of the motion to certify the record (Second National Bank v. First National Bank, 242 U. S., 600; Stratton v. Stratton, 239 U. S., 55) and that, under the rule of Broad River Co. v. South Carolina, 281 U. S., 537, 540, (see also Demorest v. City Bank Co., 321 U. S., 36, 42) this court will not issue its writ to review the Ohio court's action in sustaining the motion to dismiss the appeal.

We do not contend against the rule that certiorari may be had when the validity of a state statute is drawn in

question on the ground of its being repugnant to the United States Constitution even though the Supreme Court of Ohio may have dismissed the appeal because it regarded the question as being frivolous. (Matthews v. Huwe, 269 U. S., 262, 265.) We maintain that the Ohio courts decided that they could not, under the Ohio law, take jurisdiction of this action for a declaratory judgment.

It is apparent that the lower courts found that they were without jurisdiction to entertain the suit under the provisions of the Ohio Uniform Declaratory Judgments Act. While the trial court, having concluded against this jurisdiction, went on to consider the questions raised by the petition, the trial court clearly stated that it had no jurisdiction to entertain the action. The appellate court was of the same opinion.

The Supreme Court of Ohio in dismissing the appeal used the same language which it has frequently used in disposing of frivolous constitutional questions, but the expression "no debatable constitutional question" is also applicable to a case in which no constitutional question is raised because the court has no jurisdiction to consider the question at the suit of the particular parties. The action of the Ohio Supreme Court must be viewed against the factual background of this case. Thus viewed, it is evident that the Supreme Court did not merely consider the constitutional question to be frivolous. It declined to consider the question at all because Ohio courts have no jurisdiction to consider such questions at the request of plaintiffs who pose a question which does not affect them. Such is a disposition of the case under local law on non-federal grounds which this court will not review.

Our conclusion respecting the nature of the action of the Ohio Supreme Court is a consistent one; but if we assume that all three Ohio courts first decided that they had no jurisdiction under the Ohio law to decide the constitutional

questions and then proceeded to decide them, the rule of Allen v. Arguimbau, 198 U. S., 149, is applicable. While the opinions of the two lower courts leave little doubt as to which of the two grounds the judgment was based upon, it cannot be debated that one ground was the lack of jurisdiction of the Ohio courts to entertain this action for a declaratory judgment which was an adequate ground for the judgment sought to be reviewed. In such cases this court will not take jurisdiction. (S. W. Bell Telephone Co. v. Oklahoma, 303 U. S., 206, 212; Lynch v. New York, 293 U. S., 52, 54; Tax Commission v. Wilbur, 304 U. S., 544.)

STATEMENT OF THE CASE.

The case is made from the allegations of the fourth amended petition and the answer. The Western and Southern is organized under the laws of Ohio as a stock life insurance company. It has never issued a participating policy or a policy which permits any policyholder to participate in its earnings or surplus or to vote or otherwise participate in any corporate action. (Record, page 21.)

In 1937 the Ohio General Assembly enacted a mutualization law to provide for the conversion of life insurance companies from stock to mutual companies. The only amendments to that law became effective July 17, 1941. Pertinent provisions of the law are printed as Appendix C hereto.

On December 22, 1941, and thereafter the petitioners procured policies of the Western and Southern.

The mutualization law prescribes the corporate legislation and procedure for the adoption of a plan of mutualization by a stock corporation and for the corporation's acquisition thereafter of its stock from its stockholders by gift, bequest or purchase. Only capital and surplus may

be used in making purchases. Under Ohio law the capital and surplus of a stock life insurance company issuing nonparticipating policies belongs to the stockholders and policyholders have no rights therein. (Ohio, ex rel. National Life Assn., v. Matthews, 58 O. S., 1; Belden v. Union Central Life Insurance Co., 143 O. S., 329.)

Section 9364-1 of the mutualization act prescribes four steps which must be taken prior to acquisition of the corporation's stock. The directors must adopt a plan. The plan must be approved by a majority of the stockholders. It must be approved by a majority of a representative group of policyholders voting at a meeting called for that purpose and held under the supervision of the Ohio superintendent of insurance. It must be finally approved by the superintendent who may not give his approval unless the plan is such that the corporation, after acquiring its stock, will be left with assets sufficient to maintain its statutory deposit ($100,000), all liabilities including net values of outstanding policy contracts computed according to law and all funds, contingent reserves and surplus, save so much of the latter as shall have been paid for acquiring the shares.

Section 9364-2 (b) provides that neither the retirement of stock nor the amendment of articles of incorporation upon mutualization shall affect existing contracts and Section 9364-8 forbids the mutualized corporation to make any assessment on a policyholder or member in addition to the regular premium.

The plan of mutualization adopted by the Western and Southern provided for the acquisition of its stock by the use of capital and a part of the surplus leaving with the mutualized company, as of December 31, 1946, $12,500,000 of the then total surplus of $22,460,000. As of May 31, 1948, this surplus of $12,500,000 after mutualization has increased to $19,060,570. The first two steps in the mu-

tualization process had been taken at the time this suit was brought on the eve of the policyholders' meeting which has since been held. A majority voted in favor of adopting the plan. The Ohio superintendent of insurance has now approved the plan and it has been consummated and the company has been mutualized.

Petitioners complain that Section 9364-1 restricts the meeting of policyholders to those holding insurance amounting to at least $1,000, whose policies have been in force for at least one year. They also say that, despite our conclusion to the contrary, Section 9364-8 must be construed as requiring the company to deprive them of a vote when the time comes for the annual meeting provided by Section 9364-3 after the company has been mutualized. They have no other complaint and make no other claims, raising merely the naked question of the constitutionality of these sections in the respects noted without allegation of damage to them or of any legal right of theirs which would be affected by the judgment. They do not claim that they have an interest in the capital or surplus, or that the plan impairs the company's ability to perform its contracts, or that the statutory provisions for the protection of creditors or of policyholders are insufficient, or that the company intends to depart from the plan of mutualization or that the superintendent of insurance will fail to perform his duty as enjoined by statute. The prayer for relief is confined to a request for attorneys' fees.

SUMMARY OF THE ARGUMENT.

Judicial power to disregard a statute as unconstitutional can be invoked only by one who has sustained or is in immediate danger of sustaining direct injury personal to the challenger. No such injury or threat thereof appears in the record.

Petitioners procured their policies after Sections 9364-1 and 9364-8 of the Ohio General Code had been enacted. These sections became a part of their policies and measure their rights and they and all other policyholders similarly situated have only such rights as these sections provide. All policyholders of an Ohio stock life insurance association issuing non-participating policies, whenever such policies were issued, have no personal right or interest in the capital and surplus of the corporation. Mutualization affects only the capital and surplus and organizational structure. The Ohio law expressly preserves without change policyholders' contractual rights under their policies. Policyholders have no constitutional right to maintenance of the organizational structure or to grant or withhold consent to an organizational change.

The Ohio legislature selected a representative group of policyholders whose vote on mutualization is a part of the proceedings for conversion from stock to mutual organization, along with the vote of directors and stockholders and the approval of the state superintendent of insurance. The voting qualifications did not confer a personal privilege or economic right but rather a function in the nature of a duty from the performance of which no personal advantage would arise and from the failure to perform which no liability could result. The qualifications for such duty are based upon probable interest and the classification is justified by considerations of economic and administrative necessity in the case of corporations with millions of policyholders.

The attack on Section 9364-8 is against provisions which were inherent parts of the original contract between petitioners and respondent. Moreover the attack is premature, anticipatory and frivolous. The parties agree that each member of the mutualized corporation has a vote and the constitutional question is purely academic.

ARGUMENT.

I.

No Person Can Invoke the Jurisdiction of a Court to Challenge the Constitutionality of a Statute Unless the Operation of the Challenged Statute Will Injure or Has Injured a Personal Right of the Challenger.

Absent the elements of personal right in the plaintiff, there is no justiciable issue and a court is without jurisdiction to hear the case. To take jurisdiction would be to depart from the concept of judicial power and do violence to the principle of separation of powers.

Massachusetts v. Mellon, 262 U. S., 447, clearly enunciates this principle in the fifth syllabus as follows:

> "To invoke the judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The Court of Common Pleas, the original court in this case, recognized that it is a court and not a council of revision and that as a court it must require the litigant who invokes its jurisdiction to have some direct, tangible and practical interest in the question litigated. The rule, and the reasons for it, were stated by Mr. Justice Sutherland as follows:

> "The functions of government under our system are apportioned. To the legislative dspartment has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of

the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. Gaines v. Thompson, 7 Wall., 347. We have no power **per se** to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

(Massachusetts v. Mellon, supra, page 488.)

This proposition has been reaffirmed many times, a recent example being in the case of Stark v. Wickard, 321 U. S., 288, where Mr. Justice Reed in delivering the opinion of the court, said at page 304:

"It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity

of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers."

The trial court stated, and the discussion above emphasizes, that the petitioners' lack of a right to invoke the jurisdiction of the court to challenge the constitutionality of the mutualization statutes is based on the constitutional limits to judicial power. This being fundamental and hinging on the basic constitutional doctrine of separation of powers it cannot be circumvented by a mere change in the method of procedure. This defect exists as much whether the procedure is by way of injunction or by way of a declaratory judgment. The declaratory judgment statutes in Ohio, Section 12102-1 et seq., although broad in language, clearly comprehend this fundamental limitation. The language of Section 12102-1 while broad in scope is obviously intended to include only such questions as constitute actual controversies between parties who will be affected thereby. Sections 12102-2 and 12102-11 expressly require that parties who raise questions for declaratory judgment shall be affected by the declaration.

Petitioners' brief discloses that they have apparently misunderstood the opinion of the courts below and the cases cited therein and have erroneously concluded that the lower courts' decisions were based on the theory that the petitioners' lack of a standing to sue was due to their failure to meet the technical requirements for an injunction. The petitioners' discussion of the significance of the case of Massachusetts v. Mellon, supra, which appears at pages 10-12 of their brief, discloses that they distinguish it on the ground that it was an action for injunctive relief rather than a declaratory judgment. Petitioners completely missed that point in the Mellon case to which the Common Pleas Court was referring in his decision. Along with the

case involving the state of Massachusetts was the companion Frothingham case decided by this court in the same opinion, both cases being properly cited as "Massachusetts v. Mellon." Both cases involved attempts to restrain the secretary of the treasury (Mellon) from complying with the provisions of the so-called "Maternity Act." That portion of the decision which deals with the action brought by the state of Massachusetts has no bearing whatsoever on the instant case although it is the only portion of this court's opinion discussed by the petitioners. The latter part of this court's opinion, however, deals with the suit brought by Frothingham as a federal taxpayer. The court first decided that the interest of a federal taxpayer in the expenditure of federal funds, unlike that of a municipal taxpayer in municipal funds, is so remote as to give him no legal or justiciable right therein. Having decided that the plaintiff had no legal interest which could be injured or damaged, the court then went on to decide that as a matter of judicial power and constitutional principle it could not pass on the constitutionality of a statute at the behest of one lacking such an interest. It was from the language which is the classic formulation of this fundamental principle that the quotation found in the opinion of the Common Pleas Court was taken. This was a matter of power rather than procedure and Mrs. Frothingham would have fared no better had she cast her suit in the form of a prayer for a declaratory judgment than she did when she proceeded in equity for an injunction. As was said by Borchard on Declaratory Judgments (2d Ed.), 237:

> "* * * the power to render a declaratory judgment does not empower the courts to expand their jurisdiction over subject matter * * *."

This court has itself made this point clear in many cases including the case of Coffman v. Breeze Corporations, Inc., et al., 323 U. S., 316, where it is said (p. 324):

> "The declaratory judgment procedure is available in the federal courts only in cases involving an actual case or controversy * * *, where the issue is actual and adversary, * * * and it may not be made the medium for securing an advisory opinion in a controversy which has not arisen. * * *
>
> In any case, the court will not pass upon the constitutionality of legislation in a suit which is not adversary, * * * or upon the complaint of one who fails to show that he is injured by its operation, * * * or until it is necessary to do so to preserve the rights of the parties." (Citations omitted.)

In Nashville, C. & St. L. Ry. v. Wallace, 288 U. S., 249, the first case in which this court considered the question whether under Article III, Section 2, it had the power to review a state court decision rendered under a declaratory judgment statute, it decided that it had that power but only if there was a real dispute involving real and substantial rights.

In the recent case of Federation of Labor v. McAdory, 325 U. S., 450, this court reiterated this principle, saying at p. 461:

> "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit."

Further in the same opinion at page 463, the court added:

> "Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding as in any other."

Clearly therefore petitioners can only invoke the jurisdiction of this court, as of the courts below, to declare the complained-of statutes unconstitutional if they can show that the operation of those statutes will injure or has injured them in some personal right. This they have neither

alleged nor shown nor could they have done so. The courts of the state of Ohio concluded therefore that they were without jurisdiction to inquire into the constitutionality of these statutes at the behest of these petitioners. For the same reasons this court is also without such jurisdiction.

The petitioners, at pages 12 and 13 of their brief, go to great length in discussing and attempting to distinguish Stark v. Wickard, supra, again in an apparent misunderstanding of the use which the Common Pleas Court was making of that case in its opinion. That opinion, as a glance at the form of the citation in the lower court's opinion will show, was cited by the trial court, not for the facts or the decision of the case itself, but because in the course of his opinion Mr. Justice Reed so aptly reiterated the principle of the Mellon case. Mr. Justice Reed said that in order to secure judicial intervention a person must have a personal interest and only when that element of personal interest is present is the suit of "that character which constitutionally permits adjudication by courts under their general powers."

Mr. Justice Reed went on to say that the reason an action was permitted to the producers in that case was that they had a direct personal financial interest in the fund and its use by the secretary of agriculture. Because of this personal interest the court said those producers had standing to sue, saying at pages 308-309:

> "It is because every dollar of deduction comes from the producer that he may challenge the use of the fund."

It should be noted in passing that at page 12 of their brief petitioners quote what is purportedly Syllabus 8 from the Stark case. The official report of that case contains no "Syllabus 8" nor does any syllabus of the official report contain such a statement nor is the quotation to be found anywhere in the opinion itself.

II.

The Ohio Law Prescribing the Qualifications of Voters in the Policyholders' Meeting to Consider Mutualization is a Part of Petitioners' Contracts and They and Others Similarly Situated Have Only Such Voting Rights as the Law Provides.

These petitioners are mere contractors with the Western and Southern. Their contracts with that company were entered into on December 22, 1941, and subsequent dates. (Record, page 1.) Sections 9364-1 and 9364-8 of the Ohio General Code, the sections whose constitutionality is here being challenged, became effective on July 17, 1941. (Appendix C.) Those sections having been in effect when these petitioners entered into their contracts were as much a part of those contracts as if they had been printed on the face of each such contract. That the laws which subsist at the time of the making of a contract enter into and form a part of that contract as fully as if they had been expressly referred to or incorporated in its terms was enunciated by this court at an early date and has been consistently followed and oft reiterated. In Von Hoffman v. City of Quincy, 4 Wall., 535 at page 550, Mr. Justice Swayne speaking for this court said:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

In Abilene National Bank v. Dolley, 228 U. S., 1, 5, Mr. Justice Holmes speaking for this court, fashioned this principle in the following language:

> "Contracts made after the law was in force of course are made subject to it, and impose only such obligations and create only such property as the law permits."

To a similar effect see Walker v. Whitehead, 16 Wall., 314; Edwards v. Kearzey, 96 U. S., 595, 601; Northern Pacific Railway Company v. Wall, Administrator, 241 U. S., 87; Farmers Bank v. Federal Reserve Bank, 262 U. S., 649.

These petitioners have contracted with the Western and Southern that if that company were to mutualize as provided by the statutes of the state of Ohio they would not participate in the vote of the policyholders on such mutualization unless at that time they held contracts of insurance totaling at least $1,000 in amount and which contracts had been in effect for at least one year. At the time such vote was held these petitioners possessed no policies of amount or duration. They cannot now complain that they were injured by being denied a right which they did not contract to have until and unless they might purchase policies in sufficient amount and hold them for a sufficient length of time to qualify for voting under the statutory provisions.

This action purports to be a class action by these policyholders on behalf of themselves and all of the other policyholders of the Western and Southern. We take it as axiomatic, however, that these policyholders cannot represent members of a class to which they do not belong and that no decree of this or any other court would be binding on any policyholder who, by virtue of his circumstances and the terms of his policy, is in a class different from these policyholders. These policyholders, if they are properly representative of any class, must be representative only of that class of policyholders who took their policies and made their contracts with the Western and Southern after the enactment of the statutes in question and whose contracts therefore contained the terms of those statues as clearly as if they had been written on the face of such contracts. Such is the law of Ohio (Quinlan v. Myers, 29 O. S., 500, 507) and must be the law of this case in this court.

III.

Petitioners' as Policyholders Have No Personal Right or Interest in the Only Matters Affected by Mutualization and Therefore Can Suffer No Personal Injury or Damage as the Result of the Operation of the Statutes Whose Constitutionality They Seek to Challenge.

Quite apart from petitioners' lack of interest under their particular contracts, their lack of interest, as policyholders, as well as the lack of interest of any policyholder, in the capital or surplus of the Western and Southern has been established by the consistent holdings of the Ohio courts. The Western & Southern Life Insurance Company is an Ohio corporation. It has never issued a participating policy and all of its contracts with its policyholders are promises to pay the respective face amounts upon death and to afford certain privileges of cash-surrender, extended insurance, etc., all of which are protected by the company's reserve of $272,135,041.00 which has been established according to the law of Ohio. For many years it has been recognized by the Supreme Court of Ohio that the rights of holders of non-participating life insurance policies are measured solely by the contracts evidenced by their respective policies. In the case of Ohio, ex rel. National Life Insurance Association, v. Matthews, 58 O. S., 1, 6, Judge Bradbury said:

> "* * * the ultimate power to manage its affairs is lodged in its stockholders to the entire exclusion of its policyholders, for the right to attend corporate meetings as well as to elect its officers is vested solely in the former; whatever net profits may accrue from its business will ultimately go to its stockholders, the policyholders having no interest therein; the rights of the latter being measured by the contract evidenced by their respective policies."

Belden v. Union Central Life Insurance Company, 143 O. S., 329, was a companion case with Koplin et al. v. Ohio National Life Insurance Company which was decided at the same time and covered by the same opinion. Koplin was a non-participating policyholder of the Ohio National. Judge Bell at page 350 of his opinion said:

> "The claim that Koplin has any vested right in the organizational structure of Ohio National cannot be sustained either in logic or by authority."

In State ex rel. v. Union Central Life Insurance Company, 13 O. C. C. (N. S.), 49, affirmed without opinion 84 O. S., 459, the court said (pp. 52, 53):

> "This company had at the date in question a surplus of over $2,400,000. To whom does this belong? Undoubtedly to the company. And who are the company? The stockholders. Not a penny of it belongs to any policyholder. This surplus was accumulated by the company through a wise and judicious management of its business—the foundation of which was from the premiums paid into the company by its policyholders, the most of which came no doubt from the policies long since matured and which have been adjusted to the entire satisfaction of the policyholder and the company. This surplus adds strength and stability to the company as a whole, and is not there for the benefit or protection of the participating policyholders. It was not so intended and could not have been so understood. * * *
>
> There was no law or contract that compelled the company to create this surplus, and so far as we are aware there is no contract or law that compels the company to maintain it. Its maintenance, like its creation, must rest in the sound discretion of its board of directors. It can never be returned to the policyholders who created it, for the most of these contracts have terminated."

In the Belden case, supra, Judge Bell also pointed out at page 347,

> "These companies, if and when mutualized, will remain domestic life insurance corporations subject to

the provisions of law applicable thereto and will remain subject to the supervision of the superintendent to the same extent as before mutualization.

The superintendent by the terms of the act in question is granted authority to determine, from an examination of the books of the company at the time his approval is requested, whether the company is in such financial condition that the conversion may be consummated without loss or harm to its creditors, its shareholders or its policyholders."

Section 9364-2b provides in part—

"Neither the retirement of its capital stock nor the amendment of its articles of incorporation, as herein provided, shall affect existing suits, rights or contracts of such corporation."

Section 9364-8 provides in part—

"The code of regulations of a mutual legal reserve life insurance corporation shall provide that such corporation shall issue no policy of life insurance or annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance or annuity."

It is, therefore, apparent that the only rights which these petitioners have, namely, those secured to them by their contracts of insurance, will be fully and adequately protected, that petitioners have no rights in the capital and surplus of the company and that the capital and surplus alone are affected by the purchase of outstanding stock. As to organizational structure, capital and surplus, the only matters affected by mutualization, petitioners as policyholders have exactly the same rights and interest therein, no more and no less, as the non-policyholding general public.

It should be noted further that petitioners do not claim that they have an interest in the capital and surplus, or that the plan of mutualization impairs the company's

ability to perform its contracts, or that the statutory provisions for protection of creditors or of policyholders are insufficient, or that the company intends to depart from the plan of mutualization, or that the superintendent of insurance will fail to perform his duty as enjoined by law. Nevertheless petitioners challenge the constitutionality of the statutes providing the manner of changing this capital structure and organization through mutualization. Such a challenge does not present a justiciable cause to this court.

IV.

Policyholders of an Ohio Stock Life Insurance Company Have No Constitutional Right to Vote on Mutualization.

Section 2 of Article XIII of the Constitution of 1851 provided:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

This language is continued in Section 2 of Article XIII in its form as amended in 1912. The reservation of power which was expressed in the foregoing language has remained unchanged since 1851. This reservation is as much a part of each policyholder's contract as if it were expressly written into each policy. As was said by Judge Sherick in Belden v. Union Central Life Insurance Company, 73 O. App., 267, at page 277:

> "Plaintiffs further knew when their contracts were entered into that Section 2, Article XIII of the state Constitution of 1851, as amended in 1912, provided that
>
> > 'Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.'
>
> That provision directly empowered the Legislature to enact the Mutualization Act which permits change

> of a stock life insurance corporation's charter by amendment. It permits alteration in insurance purpose. It permits change in organization and structure, so long as the obligations of existing contracts of insurance are not impaired."

Affirming the appellate court, Judge Bell, in Belden v. Union Central Life Insurance Company, 143 O. S., 329, said at page 341:

> "This provision was in full force and effect when each of the appellants entered into his contract with his respective company and therefore he could have no vested right in the corporate structure of the company. He knew or is presumed to have known that the General Assembly had express constitutional authority to authorize a change in the organization or structure of any corporation formed under the laws of this state."

It should be noted that it is not the intention of this respondent to contend that there was a power reserved in the Ohio legislature to deprive petitioners of any interests arising out of their contracts of insurance or otherwise unconstitutionally to affect any vested rights which they might have. Once it is conceded, however, as it must be for an Ohio stock life insurance company under the decision in the Belden case, supra, that petitioners' "vested right in the organizational structure of (this corporation) cannot be sustained either in logic or by authority," (p. 350) then it is obvious that the general assembly, when exercising its reserved right to make a structural change may prescribe the manner in which that change may be made without the consent of any policyholder.

This court has stated the rules and the distinction to which we have just referred in the two cases of Wright v. Minnesota Life Insurance Co., 193 U. S., 657, and Polk v. Mutual Reserve Fund Life Association of New York, 207 U. S., 310. These cases, read together, fully answer the petitioners' contention and are conclusive on these points.

In the Wright case the defendant company was organized to write insurance on the assessment plan. It amended its articles so as to become a level premium company. The plaintiffs were the owners of assessment policies—that is, each was required to pay in accordance with a plan by which sufficient money was raised to pay the death claims as they arose. Under the level premium plan a policyholder paid a level premium each year and was not subject to assessments. Inevitably the operation of the company on the level premium plan would result in gradual reduction of the number of policyholders subject to assessment and therefore increase the annual assessments of the survivors. The plaintiff complained that such action unconstitutionally impaired their contractual rights.

The Minnesota law provided for approval of this structural change by a majority of the members of the assessment company. The plaintiffs contended that this statute was unconstitutional since the company had begun as an assessment company and plaintiffs argued that its plan of operation could never be changed without the consent of all those interested. This court rejected their contention, using the following language:

> "* * * where the right of amendment is reserved in the statute or articles of association, it is because the right to make changes which the business may require is recognized, and the exercise of the privilege may be vested in the controlling body of the corporation. In such cases, where there is an exercise of the power in good faith, which does not change the essential character of the business, but authorizes its extension upon a modified plan, both reason and authority support the corporation in the exercise of the right." (193 U. S., pages 663-664.)

In the Polk case the New York statute authorized an assessment company to change to a general life company upon the vote of the directors alone. Policyholders were not to be consulted. The plaintiffs in that case sought to

avoid the Wright decision by objecting to the statutory provision for actions by directors alone; that is, by objecting to the manner in which the change was to be made. Their contention was explained and rejected by Mr. Justice Moody in the following language (page 326):

> "Second, it is said that in the Wright case the change was made by the majority of the members of the association, while in the case at bar it was made by a majority of the directors without the consent of the members. But in each case the change was made in conformity with the provisions of the law authorizing it, and if the legislature has the constitutional power to authorize the change by the vote of a majority of the members it has the power to authorize the change by a vote of a majority of the directors. The rights of a protesting member are no more impaired in one case than in the other."

The Wright and Polk cases are authority for the fundamental propositions that states may reserve the power to change the corporate structure of insurance companies; states may provide the manner in which such changes shall be made; and where, as is the case here, vested rights of policyholders are not impaired by the structural change, states may permit such changes to be made without either the knowledge or consent of the policyholders.

V.

Section 9364-1 Does Not Extend to Policyholders' Rights or Privileges of the Character Which Are Protected by the Constitutional Guaranty of Equal Protection of the Laws.

Petitioners apparently proceed on the assumption that if the state permits any policyholders to vote, it must give a vote to every policyholder and must give each policyholder the number of votes which is commensurate with the face amount of his policy.

It has been demonstrated that policyholders have no vested rights in the organizational structure of the corporation, that changes in the structure may be made without their consent or knowledge, and that the change from a stock company to a mutual company does not impair policyholders' contracts or deprive them of any property interests. Such being the state of facts involved, petitioners must mean, although they do not say, that notwithstanding the state need not provide for any vote, yet, if it provides that some may vote it must permit all to vote.

This assumption is based upon a wholly erroneous meaning which appellants probably ascribe to the words "privileges" and "liabilities" as they are used when speaking of the constitutional guaranty of equal protection.

The liabilities to which the constitutional guaranty extends are not mere shadows. They are such liabilities as actually exist and may be enforced. The same is true of privileges. Each word carries the necessary connotation that the privilege accorded or the liability imposed must affect the individual's person or property. The privilege must be a thing of personal economic gain and the liability must entail loss of liberty or property. The Constitution extends its guaranties to matters of practical importance, not to so-called liabilities which cannot be enforced or to so-called privileges by which no one could gain.

Under its regulatory power the General Assembly could condition mutualization upon such terms as it saw fit. It chose to require votes by the directors, the stockholders, policyholders of substantial amounts and approval of the superintendent of insurance. It could have omitted any of these requirements,—even the vote of the stockholders provided it prescribed a means of protecting their vested property rights. It could have added other requirements which in the legislative wisdom might have been deemed appropriate. When it provided for a vote by those policy-

holders whose insurance was of sufficient amount and duration to satisfy the General Assembly, it accorded to those voters no privilege which was of personal value, imposed upon them no liability which could be enforced.

It is a well established principle that in such cases one not chosen by the legislature to perform such a function cannot complain that he has been deprived of equal protection of the laws. In the case of Ex Parte Gerino, 143 Cal., 412, 66 L. R. A., 249, the California statute prescribed that admission to the practice of medicine should be upon examination by a board consisting of members appointed by various medical societies. The statute was challenged on the ground that it denied equal privileges to other societies, but the court held:

> "In our opinion, the power to appoint officers in such cases is not one of the rights or privileges contemplated by the provisions of the Constitution upon which the petitioner relies. It is more in the nature of a duty than of a right or privilege. The rights and privileges referred to in those guaranties and limitations must be something for the individual benefit or advantage of the person or association upon which they are conferred, and not the power to perform a public duty for the benefit of other persons or of the public."

To the same effect see Re Mt. Sinai Hospital, 250 N. Y., 103, upholding a New York statute amending the corporate charter of non-profit institutions so as to provide that thereafter vacancies in the board of trustees should not be filled by the vote of the entire membership but rather by the vote of the remaining member trustees, the court holding that since the members had "no beneficial interest of their own to protect, no definite right secured to them by a contract with the corporation", the equal protection of the laws was not withheld by providing for a change in voting rights.

See also Elrod v. Willis, 305 Ky., 224; 203 S. W. (2d), 18, where the court upheld Kentucky legislation for the administration of a servicemen's board by persons appointed by the governor from nominations made by the American Legion, notwithstanding the protest of Veterans of Foreign Wars and similar organizations.

Bullock v. Billheimer, 175 Ind., 428; 94 N. E., 763, where private agricultural societies when appointing representatives to administer work of the agricultural experiment station were held to be performing public duties rather than exercising private privileges. *Semble,* Kotch v. Pilot Commissioners, 330 U. S., 552.

Similarly, with the provisions made by the legislature for overseeing and accomplishing the execution of its directions with regard to the mutualization of a stock life insurance company. It could have provided for more, less, or different means of accomplishment and execution of its policy; but to the extent that it does place on any group or groups the function of executing its policy, the persons not selected to perform such function have not been deprived of any right or privilege guaranteed to them by equal protection, due process or any other provision of the state or federal constitutions.

VI.

Section 9364-1 of the General Code is Valid. Its Limitations Are Not Unreasonable or Arbitrary, But Are Within the Discretion of the General Assembly.

Of the approximately 2,666,666 policyholders of the company, the General Assembly has selected those policyholders whose insurance amounts to at least $1,000 and whose policies have been in force at least one year prior to the meeting as the policyholders who must approve a plan of mutualization. Their number exceeds 660,000. Obviously no distinction is made between policyholders in

like circumstances and conditions. Every policyholder whose insurance equals $1,000 and whose policy has been in force for a year is given a vote. None whose insurance is less than $1,000 or of less than one year's standing has a vote on mutualization.

Petitioners contend that those whose insurance is less than $1,000 or whose insurance has been in force for less than one year are denied the equal protection of the laws because they were not given votes in proportion to the amount of insurance held by them. Petitioners ask (Brief, page 21) if the statute would be upheld if no policyholders were entitled to vote. The answer is "yes."

Because all of the policyholders in question hold non-participating policies, they had no interest in the company or in its assets but had only contractual rights, which are in no way affected by the mutualization. The General Assembly could as well have dispensed with the approval of all policyholders as it could (and does) dispense with the approval of any creditor in a reorganization or in the purchase of its own stock by a corporation organized under the General Corporation Act.

In Polk v. Mutual Reserve Life Insurance Association of New York, discussed at page 22, supra, the court said:

> "If the legislature has the constitutional power to authorize the change by the vote of a majority of the members, it has the power to authorize the change by a vote of a majority of the directors."

In the case of Field v. Barber Asphalt Paving Company, 194 U. S., 618, the plaintiff sought relief against tax assessments on the ground that the act under which they had been made violated the equal protection of the laws. Under the act in question resident owners of the property liable to taxation were allowed a protest, while non-resident owners were not. In upholding the law this court said, at page 622:

> "The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resi-

dent property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-residents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike. It has been held to be within the power of the legislature of Missouri to authorize the council to order the improvement to be made without consulting property owners. Buchanan v. Broadwell, 88 Missouri, 31. If the legislature saw fit to give to those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution."

The law provides that each policyholder with the necessary qualifications shall have but one vote, regardless of the amount of insurance held. Petitioners say that this provision also denies them equal protection, apparently assuming that there is something in the equal protection clause requiring that the legislature shall provide that the policyholder having the lowest amount of insurance shall be entitled to one vote, and all other policyholders shall be entitled to the number of votes by which the amount of their insurance is a multiple of the lowest policyholder's insurance. But there is nothing in the Constitution or the statute or in common sense which requires such rule. At common law each stockholder of a private corporation has one vote, regardless of the amount of his investment (18 Corpus Juris Secundum, Corporations, Sec. 549, page 1247). This is the common law of Ohio (State ex rel. v. Gray, 20 O. App., 26) but the statute (Sec. 8623-50) now permits ad valorem voting in corporations having stockholders. The common law is retained for members of corporations without stockholders (Sec. 8623-104).

Petitioners, however, concentrate their attack upon the provision that only those having insurance equal to $1,000

may vote. They contend that the distinction thus made is absolutely without justification, is arbitrary and unreasonable. As was stated by Mr. Justice Holmes in Buck v. Bell, 274 U. S., 200 at page 208, the claim that state legislation violates the equal protection clause of the Fourteenth Amendment "is the usual last resort of constitutional arguments."

The record in this case shows that there were approximately 2,666,666 policyholders of the defendant company and that the changes in the policies issued by the company averaged more than 11,000 per week. These facts show the enormous amount of clerical labor and expense which would necessarily be involved in any election or vote conducted among all the policyholders. Obviously, limitations of the class of policyholders to whom ballots must be sent would greatly assist in reducing the labor and expense involved in conducting any such a vote. Apparently the legislature considered that the position of the policyholders as a whole, especially in view of the other safeguards upon mutualization (approval of the superintendent, finding of proper financial condition, etc.) would be sufficiently protected by limiting the vote in the manner provided by the statute.

Ohio was not the first state to draw a line in such cases, nor was the line which it drew either new or unusual. The classifications adopted were not conceived by the Ohio General Assembly in 1937 when Section 9364-1 was adopted in substantially its present form so far as concerns the matters now under discussion. These classification were borrowed from a New York statute which had been in effect for many years. Both the one year and the $1,000 limitations are the same as those provided by the law of New York. (29 McKinney Laws, Insurance Law, Sec. 199.)

The question presented to the court is whether the legislature had the power to so limit a vote which it was not required to give at all. Petitioners contend that since con-

ceivably the legislature might have given a vote to each policyholder in proportion to the amount of his insurance, it was required to do so. However the authorities do not sustain this contention.

It is unnecessary for our purposes and would be a burden on this court to interlard this brief with exhaustive discussion and citation of the myriad cases in which this court has passed on and discussed the question of reasonable legislative classification. Certain fundamental principles which are peculiarly apposite to the facts of this case can be briefly summarized as follows:

a. There is a presumption of validity which attaches to legislative action which puts the burden on the petitioners in this case to show that the classification made by the Ohio legislature was so unreasonable that a court could say that there was no rational basis within the knowledge and the experience of the legislators upon which such a classification could rest. Metropolitan Co. v. Brownell, 294 U. S., 580.

b. It is the duty of a court when such a challenge is made to resolve all reasonable doubts in favor of the legislature and to sustain the action of the legislature if any reasonable basis for the distinction made by the legislature can be found. Corporation Commission v. Lowe, 281 U. S., 431.

c. Before a court can interfere with the legislative judgment it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. International Harvester Co. v. Missouri, 234 U. S., 199.

d. The fact that the court disagrees with the wisdom of the legislature in making the challenged justification is not sufficient to justify striking down the action of the legislature. Bayside Fish Co. v. Gentry, 297 U. S., 422; Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 549.

e. Classification based on numbers alone is not necessarily unreasonable. Bryant v. Zimmerman, 278 U. S., 63.

Applying these principles to the facts presented to this court by the record herein, it is submitted that petitioners have completely failed to sustain their burden of showing that the classification between classes of policyholders made by the Ohio legislature in the mutualization act is without any possible reasonable basis. The presumption of validity which attaches to the action of the legislature has not been rebutted. The facts heretofore developed demonstrate that the policyholders were not as a matter of right entitled to be consulted at all in the making of these changes in corporation structure; that the legislature nevertheless desired to permit a representative group of policyholders to participate in the mutualization process; and that the large number of policyholders whose identities were changing momentarily made it impossible for the legislature to achieve that desire without drawing a line between classes of policyholders based on amount and duration of contract. It is submitted that in view of these facts there can be no substance to the contention that the line which the legislature did draw between classes of policyholders rests on no rational basis. The legislature might perhaps have drawn the line a little wider and still have made its policy administratively achievable but the fact that the line could possibly have been drawn at some place other than where it was does not make the action of the legislature subject to attack on the grounds of an unreasonable classification. Mr. Justice Holmes achieved a classic formulation of this principle in his dissenting opinion in the case of Louisville Gas Co. v. Coleman, 277 U. S., 32, where he said at page 41:

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems

> arbitrary. It might as well or nearly as well be a little more to the one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

In the instant case the rights of all policyholders existing before mutualization are preserved intact. This is true whether or not they are given a vote on mutualization. The policyholders who are given a vote do not acquire any valuable personal right or privilege but, as pointed out above, serve merely as a part of the process of mutualization. This point is emphasized by the fact that the petitioners do not claim that the result of the vote would have been different had all policyholders been given a vote nor do they claim that the price fixed for the shares was excessive or the reserves remaining inadequate.

Petitioners cite the case of Gulf, Colorado and Santa Fe Railway Company v. Ellis, 165 U. S., 150. In the Gulf case a Texas statute required railroads as such to pay an attorney's fee to the successful adversary in lawsuits involving claims of less than $50.00. Railroads alone were singled out for the application of this penalty. No reason was presented for distinguishing railroads from any other class of corporations or of defendants. The Gulf decision should be compared with the provisions of the Federal Code limiting diversity jurisdiction to cases involving $3,000 or more. Obviously, the purpose of the $3,000 limitation is administrative convenience only. It is designed to prevent clogging the federal docket with inconsequential cases. There is no conceivable analytical difference between a negligence case involving $2,000.00 and one involving $3,001.00. Nevertheless there is no question as to the validity of the $3,000 limitation. So in the case at bar the legislature limited the vote to policyholders with a substantial amount

of insurance in order to afford a feasible, practical method of obtaining the views of policyholders. While it appears that a large number of policyholders did not receive a vote, it also appears that some 666,666 policyholders did receive notice and a ballot. This is a very large number of people to consult on a question such as mutualization wherein the policyholders have everything to gain and nothing to lose. They are guaranteed against loss by the statutory provisions requiring that the superintendent be assured that sufficient funds are left in the company to meet all the obligations of the company and to fulfill the contracts which the policyholders own. There is no reason to suppose that any substantial group of policyholders would have views opposed to that of any other substantial group of policyholders. Clearly the legislature, while protecting the rights of all policyholders by other methods could, as it did, require the approval only of those policyholders having a substantial amount of insurance without injuring others since none of them had any rights in any event.

VII.

Petitioners Cannot Complain of Voting Qualifications Provided by Section 9364-8 at the Time Petitioners Secured Their Policies. Petitioners' Contentions Are Wholly Anticipatory and Frivolous.

Section 9364-8 was in effect when petitioners procured their policies. The provisions of this section became a part of their policies (see Subdivision II of this brief). Petitioners' position is similar in fact and precisely the same in legal effect as that of persons who purchase stock at a time when the articles, or the law which is a part of the articles, provide voting qualifications of classes of stockholders.

Petitioners' contention is premature and frivolous. Section 9364-8 applies to the annual meetings of members of

the corporation after it has become mutualized. When this suit was filed the corporation was a stock company and the process of mutualization was not had completed. The first meeting of members of the mutualized company will not be held until March of 1949. No one has threatened to deny any policyholder a right to vote at that meeting. To the contrary, respondent intends that every policyholder shall have a right to vote. This court does not anticipate constitutional questions which may arise in the future. (Anniston Manufacturing Co. v. Davis, 301 U. S., 337, 355; New Jersey v. Sargent, 269 U. S., 328, 338-340; Ashwander v. Tennessee Valley Authority, 297 U. S., 288, 324-325.)

The Western and Southern intends to admit all policyholders to the annual meeting of 1949 and permit every policyholder to vote, being of the opinion that Section 9364-8, when properly construed, does not forbid such action. Petitioners insist that this section must be construed as denying their voting rights and that the section is therefore unconstitutional. This is the "controversy" upon which this phase of the suit is grounded. Petitioners insist on a vote for each member, insist that respondent may not carry out its intention to permit such a vote because the law forbids it and then insist that the law is unconstitutional.

It should be noted that the mutualized corporation is subject to the provisions of the Ohio General Corporation Act relating to corporations not for profit (The State v. The Standard Life Assn., 38 O. S., 281) which provides:

> "Unless otherwise provided by law, the articles or by the regulations, each member of a corporation not for profit shall be entitled to one vote." (Sec. 8623-104.)

It should be further noted that the common law of Ohio, in the absence of statutory or contractual restrictions, gives a vote to each member of an Ohio corporation. If respondent construes Section 9364-8 correctly each member will

have a vote, but if petitioners construe the section correctly and the section, as so construed, is unconstitutional, then each member will still have a vote. It is only in the event that respondent's construction is wrong, that petitioners' construction is right, and that the section **is** constitutional, that members' voting rights will be restricted. In that event neither petitioners nor respondent may complain.

Such being the case, the court will not pass upon the constitutionality of the statute in order to assure the parties, petitioners and respondents, of the correctness of their common conclusion that each member is entitled to a vote, or to disappoint that conclusion by holding that the statute, although misconstrued by respondents, is constitutional. To do so would be to depart from long-established rules of this court relating to the disposition of constitutional questions. (Liverpool, New York and Philadelphia Steamship Co. v. Commissioners of Emigration, 113 U. S., 33, 39; Ashwander v. Tennessee Valley Authority, 297 U. S., 288, 346-347.

Respectfully submitted,

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APPENDIX A.

Opinion—Court of Appeals.

(Rendered on the twenty-third day of January, 1948.)

By the Court:

This is a law appeal from the Court of Common Pleas of Franklin county, Ohio. The action was one for a declaratory judgment seeking to be declared as invalid and unconstitutional Sections 9364-1 and 9364-8 of the General Code of Ohio. The trial court, in a lengthy and well considered opinion, after setting forth the facts admitted by the pleadings, found that these facts were not sufficient to entitle the plaintiffs to invoke the jurisdiction of the Common Pleas Court to determine the constitutionality of these statutes. However, in view of the importance of the questions raised, it deemed it proper to consider the claims of the plaintiffs as to the unconstitutionality of the aforesaid sections, and after so doing it declared them to be constitutional. The assignments of error are all directed to these rulings by the trial court. For this court to write an extended opinion would serve no good purpose as we find the authorities for the rulings are fully set forth in the opinion of Judge Gessaman, which we adopt in its entirety as that of our own.

We find no error in the record and the judgment is affirmed.

Wiseman, P. J., Miller and Hornbeck, JJ., concur.

APPENDIX B.

Decision—Court of Common Pleas.

(Rendered on the first day of July, 1947.)

Gessaman, J.:

This is an action for a declaratory judgment presented to the court upon the fourth amended petition and the separate answers of the defendants. Plaintiffs allege that they bring the action upon their own behalf as policyholders of defendant company and on behalf of the company and all policyholders. The issues will be understood by a brief review of the fourth amended petition (hereinafter referred to as the "petition").

Plaintiff, William L. Chesbrough, alleges that he purchased a policy of life insurance from the defendant company on February 2, 1942, in the amount of $500.00 and one on July 16, 1946, in the amount of $5,325.00.

Plaintiff, Mildred J. Chesbrough, alleges that she purchased a policy of life insurance from the defendant company on December 22, 1941, in the amount of $500.00; one on December 13, 1943, in the amount of $284.00 and one on February 1, 1944, in the amount of $1,000.00.

Plaintiffs further allege that on October 8, 1946, the directors of defendant company adopted a plan of mutualization whereby defendant company would be converted from a domestic stock life insurance company to a mutual life insurance company without capital stock; that by this plan defendant company would acquire all of its outstanding stock ($30,000,000.00) in exchange for United States bonds of the par value of $39,960,000.00; that each policyholder shall become a member of the corporation; that said plan was approved by the stockholders of the company on October 8, 1946; that a meeting of those policyholders specified in Sec. 9364-1, G. C., was held on January 30, 1947, and that, by vote held in the manner specified in said section the plan was approved; that said

plan will be submitted to the superintendent of insurance for his approval or disapproval.

Plaintiffs further allege that 86% of the outstanding policies of the company were for amounts less than $1,000.00; that this amount represents 75% of the policyholders, all of whom had no right to vote by virtue of the provisions of Sec. 9364-1, G. C. Plaintiffs then allege that Sec. 9364-1, G. C., denies to the policyholders of defendant company "equal protection of the laws and is discriminatory in contravention of the Constitution of the United States of America and the state of Ohio" in four respects, namely: (1) In that it "grants the right to vote on a plan of mutualization only to those policyholders insured in an amount of at least $1,000.00, and whose policy at the time of the policyholders' meeting, shall have been in effect for at least one year"; (2) In that it grants to such policyholders only one vote regardless of the number of policies owned or held; (3) In that it denies the right to vote to a large number of policyholders (those not qualifying as above set forth); and (4) In that it denies the right to vote to policyholders whose policies have been in effect for less than one year.

In substantially the same respects plaintiffs allege that Sec. 9364-8, G. C., denies to the policyholders the equal protection of the laws and is discriminatory in contravention of the Constitution of the United States of America and of the state of Ohio.

Plaintiffs then pray that the court find that Sec. 9364-1, G. C., and Sec. 9364-8, G. C., be held to be invalid and unconstitutional and particularly in those respects above set forth.

The defendant company admits practically all of the allegations of the petition except the allegation that the action is brought on behalf of the company and all policyholders, and the allegations of unconstitutionality, all of which it denies.

Before proceeding to consider the points at issue, it should be pointed out that, of the four steps required by Sec. 9364-1, G. C., et seq. for mutualization, the first three have been taken and there is no question but that they have been taken according to law. The fourth step (action by the superintendent of insurance) yet remains.

The first issue upon which the parties disagree is the plaintiffs' right to invoke the jurisdiction of the court to determine the constitutionality of the mutualization statutes. On this and other issues, counsel have submitted a large number of authorities. To review them all would only unduly extend this opinion. Therefore, we shall refer only to those which we feel are decisive of the issue under consideration.

Counsel for plaintiffs urge that the declaratory judgment act (Sec. 12102-1, G. C., et seq.) is broad enough to permit such an action in a situation where "it is perfectly obvious that situations might well arise in connection with the conversion * * * wherein the liquidation of the capital and surplus accounts, together with other factors, would make it undesirable to the point that the policyholders would be overwhelmingly, or even unanimously, opposed to the mutualization which would ipso facto make them members of the corporation and responsible for the future conduct of the business". (Brief of plaintiffs, p. 3.) At no point, however, either in the petition or in plaintiffs' briefs, do we find any definite allegation or claim that plaintiffs have been or will be injured by the proposed plan in any particular respect.

It is well settled that the holder of a non-participating policy—such as those in this case—has no vested right in the organizational structure of the company.

> "The claim that Koplin has any vested right in the organizational structure of Ohio National cannot be sustained either in logic or by authority."
>
> (Citing Ohio, ex rel. Nat'l Life Assn., v. Mathews, Supt. of Ins., 58 O. S., 1.)
>
> Belden v. Union Central Life Ins. Co., 143 O. S., 329.

See also State, ex rel. v. Union Central Life Ins. Co., 13 O. C. C. (N. S.), 49.

It also seems well settled, both on reason and authority that,

> "To invoke the judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."
>
> Massachusetts v. Mellon, 262 U. S., 447, Syl. 5, and p. 488.

See also Stark v. Wickard, 321 U. S., 288 at p. 304.

> "This statute (declaratory judgment) is available only to those persons who have an 'actual controversy'. Persons are not entitled to litigate questions which may never affect them to their disadvantage."
>
> Driskill v. Cincinnati, 66 O. S., 372, at p. 374.

It is true that the General Assembly has directed, in Sec. 12102-12, G. C., that the declaratory judgment act shall be "liberally construed and administered", but it appears to be equally true that one may not challenge the constitutionality of a statute unless and until he has an "actual controversy" or "he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement". Since plaintiffs have no vested right in the organizational structure of defendant company, it is quite clear that there is, then, no allegation in the petition or even a claim in the briefs that plaintiffs have sustained or even that they are in imminent danger of sustaining some direct injury. The claim or argument that some "situations might arise" that "would make mutualization undesirable" certainly does not give rise to a right to invoke the jurisdiction of a court for a declaratory judgment.

Under the facts as alleged, it is the opinion of the court, that the plaintiffs are not in position, nor do they have the right, to challenge the acts complained of or the constitutionality of the statutes in question.

II.

In view of the importance of the questions raised, we deem it proper for the court to proceed to consider the claims of plaintiffs as to the unconstitutionality of Sec. 9364-1, G. C., and Sec. 9364-8, G. C., first, as to Sec. 9364-1, G. C.

This section was first enacted by the General Assembly in 117 O. L., 608, and became effective August 23, 1937. It was amended, to take its present form, in 119 O. L., 70, effective July 17, 1941. All of the policies of insurance which plaintiffs allege that they hold, were purchased by them subsequent to July 17, 1941. Therefore, when they purchased the policies they were presumed to know that the General Assembly had authorized these changes in corporatè structure of defendant company, and in the methods set forth in the statute. Sec. 2, Art. XIII of the Ohio Constitution provides, in part, as follows:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. * * *"

As stated in Belden v. Union Central Life Ins. Co., supra, at pp. 341-2:

> "This provision of the Constitution was adopted on September 3, 1912, and affords full and complete authority to the General Assembly to provide by general laws for the formation of corporations and for changes in the organizations or structure of existing corporations.
>
> "This provision was in full force and effect when each of the appellants entered into his contract with his respective company and therefore he could have no vested right in the corporate structure of the company.

He knew or is presumed to have known that the General Assembly had expressed constitutional authority to authorize a change in the organization or structure of any corporations formed under the laws of this state."

To which we add, that when plaintiffs purchased their policies, they knew or were presumed to know that the General Assembly had authorized the changes here complained of and in the manner here attacked; furthermore, that plaintiffs, by virtue of the constitutional and statutory provisions then in effect, had no vested right in the corporate structure of the defendant company. Therefore, this question must be approached with those principles in mind.

It must be remembered that plaintiffs do not allege that the proposed change has or will impair, in any respect, the obligations of any of their contracts of insurance. The questions are, merely, does Sec. 9364-1, G. C., deny to plaintiffs the equal protection of the laws or is it discriminatory in any of the respects heretofore set forth?

We must also keep in mind that it was also held in the Belden case, supra, at p. 348 (referring to Sec. 9364-1, G. C., et seq.):

> "From what has been said, it follows that the act is not unconstitutional and void upon its face."

And also that, (p. 349),

> "Where, as here, an attack is made upon an act which is valid on its face, upon the ground that, as applied to a given state of facts, it is invalid, the burden rests upon the party making such attack to present clear and convincing evidence of a presently existing state of facts, which make such act unconstitutional and void when applied thereto."

Plaintiffs' claim of unconstitutionality is based upon the fact that certain of the policyholders do not have the right to vote and that those who do, have only one vote regard-

less of the number of policies held. It will, of course, be conceded that there is nothing in either the Constitution, or in plaintiffs' contract which grants to them any right to a voice in the proposed change. The only voice given to a policyholder is that specified in Sec. 9364-1, G. C., and to those who can qualify thereunder. It is a voice voluntarily and gratuitously given, not one which the legislature was required to give. How, then, can the fact that some were given the right and others not, violate any provision of either the United States or Ohio Constitutions? Counsel for plaintiffs have not referred to any specific section of either Constitution, and, boiled down, their claim is that the classification set forth in Sec. 9364-1, G. C., is unreasonable and discriminatory. Again, we ask, how can such legislative classification be discriminatory or deprive plaintiffs of the equal protection of the laws, when neither by Constitution or by contract did they have any voice in such matter? We think that it cannot be.

Many cases have been cited by counsel for both sides upon the question of what is and what is not a proper classification. The law is well summarized in 12 Am. Jur., pp. 214-216 (Sec. 521, Constitutional Law):

Page 216:

> "All reasonable doubts must be resolved in favor of a classification made by the legislature, and it is the duty of the court to sustain it if any real distinction can be found."
>
> "The authorities cumulatively establish the rule that the assailant of a classification must clearly establish invalidity * * *."

The only facts before the court are those admitted allegations of the petition to the effect that a certain percentage of the policyholders are not entitled to vote. Under the rule above set forth, that fact does not per se make statute unconstitutional or invalid. Various reasons, in argument, have been adduced for the classification as

enacted, such as minimizing the cost of conducting the election, the saving of time, etc., but none of these need be considered. Based upon both reason and authority, the classification is not, per se, unconstitutional and no facts have been pleaded which prove it to be unconstitutional. Furthermore, we revert to our original conclusion, since plaintiffs did not either by Constitution or by contract, have a right to a vote in such matters, the granting of the right to some, as a gratuity, but not all, does not make the act unconstitutional in its operative effect.

It should here be observed that the approval of the policyholders who can qualify, is the third of four steps necessary for the change. The first is the approval of the board of directors, which has been done. The second is the approval of the stockholders, which has also been secured. The last is the approval of the superintendent of insurance, which has not yet been secured. But we call attention to these four steps to emphasize the fact that great precaution has been required by the General Assembly, and that finally, for the protection of all concerned, the superintendent of insurance may disapprove the plan or he may approve it if he finds that "the company is in such financial condition that the conversion may be consummated without loss or harm to its creditors, its shareholders or its policyholders". (Belden case, supra, pp. 347-348.)

It is our opinion, therefore, that the classification set up in Sec. 9364-1 is not discriminatory and that it does not deny to plaintiffs the equal protection of the laws.

III.

In considering the question that has been raised in connection with Sec. 9364-8, G. C., it is important to note that plaintiff, Mildred J. Chesbrough, is the holder of $1,000.00 policy of insurance purchased from the defendant

company on February 1, 1944. Therefore, she is entitled to vote at a policyholders' meeting. The plaintiff, William L. Chesbrough, is the holder of a $5,325.00 policy purchased from defendant company on July 16, 1946. Therefore, in only a few days he will be entitled to a vote. Therefore, for all practical purposes, there can be no dispute between the parties on this point. The first annual meeting is set for March 8, 1948, and it would hardly be possible to call a special meeting between now and July 16, 1947. As between the named parties there is no constitutional question to be decided and the question need not be decided. State, ex rel. Clarke, v. Cook, Auditor, 103 O. S., 465; Rucker v. State, 119 O. S., 189, and Wiggins v. Babbitt, 130 O. S., 240. However, since plaintiffs allege that they bring this suit on behalf of all other policyholders, we add that for the reasons given under subdivision II of this opinion, it is our opinion that Sec. 9364-8, G. C., is not violative of either of the Constitutions as alleged.

It is the opinion of the court, therefore, that the fourth amended petition be dismissed and judgment entered for the defendants.

Motion for new trial, if filed, may be overruled.

APPENDIX C.

Sec. 9364-1. **Conversion of domestic stock life insurance corporation into a mutual life insurance corporation; plan; "policyholder" defined.**

Any domestic stock life insurance corporation, duly incorporated under a general law, may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock, provided, however, that such plan: (1) shall have been adopted by a vote of a majority of the directors of such corporation; (2) shall have been approved by a vote of stockholders representing a majority of the capital stock then outstanding at a meeting of stockholders called for the purpose; (3) shall have been approved by a majority of the policyholders voting at a meeting, called for the purpose, of policyholders each insured in at least one thousand dollars and whose insurance shall then be in force and shall have been in force for at least one year prior to such meeting; the term "policyholder" as used herein shall be deemed to mean the person insured under an individual policy of life insurance, and the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in cases of assignment as hereinafter provided: in the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons insured or the persons so declared to be the owner shall be deemed one policyholder for the purposes hereof; in case any such

policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall have been filed at the principal office of the corporation at least thirty days prior to the date of said meeting, then such assignee shall be deemed a policyholder within the meaning hereof; except as provided herein, an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof; the reference herein to insurance in the amount of $1,000 or more shall be deemed to include any annuity contract, the commuted value of which is $1,000 or more on the date of said meeting, and any pure endowment contract for the principal sum of $1,000 or more; notice of such meeting shall be given by mailing such notice from the home office of such corporation at least thirty days prior to such meeting in a sealed envelope postage prepaid addressed to such policyholders at their last known post office addresses, provided, that personal delivery of such written notice to any policyholder evidenced by written receipt therefor may be in lieu of mailing the same, and such meeting shall be otherwise provided for and conducted in such manner as shall be provided in such mutualization plan; provided, however, that policyholders may vote in person, by proxy or by mail; that all votes shall be cast by ballot on a uniform ballot furnished by the corporation, and the superintendent of insurance shall supervise and direct the method and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the superintendent of insurance and to the corporation the result thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the superintend-

ent of insurance; that all necessary expenses incurred by the superintendent of insurance shall be paid by the corporation as certified to by him; and (4) shall have been submitted to the superintendent of insurance and shall have been approved by him in writing; provided that every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the superintendent, and provided that neither such plan, nor any such payment, shall be approved by the superintendent unless at the time of such approvals, respectively, the corporation, after deducting the aggregate sum appropriated by such plan for the acquisition of any part or all of its capital stock, and in the case of any payment not fixed by such plan and subject to separate approval as aforesaid after the approval of such plan, after deducting also the amount of such payment, shall be possessed of assets sufficient to maintain its deposit theretofore made with the superintendent of insurance and not less than the entire liabilities of the corporation, including the net values of its outstanding contracts computed according to the standard adopted by the corporation under the provisions of section 636 of the General Code of Ohio, and also all funds, contingent reserves and surplus save so much of the latter as shall have been appropriated or paid under such plan.

(119 Ohio Laws 70; effective July 17, 1941)

Sec. 9364-2. **Acquisition of stock.**

If a stock life insurance corporation shall determine to become a mutual life insurance corporation, it may, in carrying out any plan to that end under the provisions of the preceding section, acquire any shares of its own stock by gift, bequest or purchase. Until all of such shares are acquired, any shares so acquired or acquired pursuant to the provisions hereinafter made concerning dissenting

stockholders shall be acquired in trust for the corporation as hereinafter provided and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote, until all of the capital stock of such corporation is acquired when the entire capital stock shall be retired and cancelled and thereupon, the corporation shall be and become a mutual life insurance corporation without capital stock.

(119 Ohio Laws 71; effective July 17, 1941)

Sec. 9364-2a. **Rights and privileges of dissenting stockholders.**

(This section is omitted.)

Sec. 9364-2b. **Appointment, qualification, bond, etc., of trustees; deposit by corporation retained by superintendent of insurance.**

The trustees provided for in section 9364-2 shall be appointed and vacancies shall be filled by the superintendent of insurance. Such trustees shall be duly qualified directors of the corporation at the time of such appointment and shall continue as such trustees until the purpose of this trust is accomplished or abandoned unless removed for cause by the superintendent of insurance. Said trustees shall file with the superintendent of insurance a duly verified acceptance of their appointment and declaration that they will faithfully discharge their duties as such trustees. Such trustees shall give and file with the superintendent of insurance bonds in such an amount as under the circumstances the superintendent of insurance deems just and proper with sureties thereon approved by the superintendent of insurance. All dividends and other sums received by said trustees on the shares of stock held by them shall be immediately repaid to said corporation. The necessary expenses of executing the trust shall be paid by the

corporation. All shares held by such trustees shall be deemed admitted assets of such corporation at their par value.

Neither the retirement of its capital stock nor the amendment of its articles of incorporation, as herein provided, shall affect existing suits, rights or contracts of such corporation. The deposit of one hundred thousand dollars in securities and/or mortgages made by such corporation pursuant to section 9364, General Code, shall be retained by the superintendent of insurance in trust for the benefit and security of all of the members and policyholders of such corporation.

(119 Ohio Laws 75; effective July 17, 1941)

Sec. 9364-3. **Officers and directors.**

When a stock life insurance corporation has become converted into a mutual life insurance corporation as herein provided, the officers and directors or trustees of the original corporation so converted shall remain as the officers and directors or trustees of the newly converted corporation until the next annual meeting for the election of officers and directors or trustees, when their successors shall be elected in the manner provided in the articles of incorporation and code of regulations by said corporation theretofore adopted.

(119 Ohio Laws 75; effective July 17, 1941)

Sec. 9364-4. **Corporate powers, how exercised.**

The corporate powers of a domestic mutual life insurance corporation shall be exercised by, and its business and affairs shall be under the control of, a board of directors or trustees composed of not less than three nor more than twenty-one natural persons who are policyholders or members and who are at least twenty-one years of age and at least three of whom are residents and citizens of this state.

(119 Ohio Laws 75; effective July 17, 1941)

Sec. 9364-5. **Term of directors or trustees.**

(This section is omitted.)

Sec. 9364-6. **Meetings of board.**

(This section is omitted.)

Sec. 9364-7. **Executive committees.**

(This section is omitted.)

Sec. 9364-8. **Code of regulations; contents; alteration, etc., of code.**

(a) The code of regulations of any such corporation shall provide that each policyholder of the corporation shall be a member of the corporation. The term policyholder as used herein shall be deemed to mean the person insured under an individual policy of life insurance, the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in cases of assignment as hereinafter provided. In the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons so declared to be the owner shall be deemed one policyholder for the purposes hereof. In case any such policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall be filed at the principal office of the corporation, then such assignee shall be deemed a policyholder within the meaning hereof, but for the purpose of determining voting rights such assignment shall not be effective until thirty days after it shall have been filed with the corporation. Except as provided herein an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof.

Such code of regulations shall provide that each policyholder insured in at least $1,000.00, or holder of an annuity, which at normal date of maturity requires the payment of $100.00 or more annually, and whose insurance or contract of annuity shall then be in force and which has been in force for at least one year prior to a policyholders' meeting, shall be entitled to one vote only irrespective of the number of policies or contracts held by him or the amount thereof.

(b) The power to make, alter, amend or repeal the code of regulations shall be vested in the board of directors or trustees unless reserved to the members by the articles of incorporation.

(c) The code of regulations of a mutual legal reserve life insurance corporation shall provide that such corporation shall issue no policy of life insurance or annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance or annuity.

(119 Ohio Laws 76; effective July 17, 1941)

APPENDIX D.

Sec. 12102-1. **Declaratory judgments, when granted, force and effect.**

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Sec. 12102-2. **(Construction and validity of instrument, etc., may be determined, when.)**

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Sec. 12102-3. **Contract.**

A contract may be construed either before or after there has been a breach thereof.

Sec. 12102-4. **Determination of rights or legal relations.**

(This section is omitted.)

Sec. 12102-5. **Powers not restricted.**

(This section is omitted.)

Sec. 12102-6. **Court may refuse judgment.**

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Sec. 12102-7. **Review.**

(This section is omitted.)

Sec. 12102-8. **Further relief based on declaratory judgment.**

(This section is omitted.)

Sec. 12102-9. **Determination of issues of fact.**

(This section is omitted.)

Sec. 12102-10. **Costs.**

(This section is omitted.)

Sec. 12102-11. **Declaratory relief; parties.**

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceed-

ing. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

Sec. 12102-12. **Purpose of act.**

Sec. 12102-13. **"Person" defined.**

Sec. 12102-14. **(Independent sections.)**

Sec. 12102-15. **Interpretation of act.**

Sec. 12102-16. **(Title of act.)**

(These last five sections are omitted)

(Sections 12102-1 through 12102-16 comprise the act found in 115 Ohio Laws 495 to 497; effective October 10, 1933.)